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No. 08-1021

IN THE
Supreme Court of the United States

GILEAD SCIENCES, INC., ET AL.,
Petitioners,

v.

TRENT ST. CLARE, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE BIOTECHNOLOGY INDUSTRY ORGANIZATION, THE BAY AREA BIOSCIENCE ASSOCIATION, AND BIOCOM AS *AMICI CURIAE* SUPPORTING PETITIONERS

TOM DILENGE
GENERAL COUNSEL
BIOTECHNOLOGY INDUSTRY ORGANIZATION
1201 Maryland Ave., SW
Suite 900
Washington, DC 20024
(202) 962-9200

JONATHAN L. MARCUS
Counsel of Record
JAMES P. SULLIVAN
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 662-6000

Counsel for Amici Curiae
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INTEREST OF *AMICI CURIAE*

This brief *amici curiae* in support of Petitioners is filed on behalf of the Biotechnology Industry Organization (BIO), the Bay Area Bioscience Association (BayBio), and BIOCOM.[1]

As the principal trade association of the biotechnology industry, BIO represents more than 1200 members, many of which are publicly traded companies. Petitioner Gilead Sciences, Inc. is a BIO member. BIO regularly files *amicus curiae* briefs in cases that present issues of vital concern to the industry. *See, e.g.*, *Wyeth v. Levine*, 555 U.S. ___ (2009); *Quanta Computer, Inc. v. LG Elecs., Inc.*, 128 S. Ct. 2109 (2008); *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

BayBio is a trade association representing over 450 life sciences companies and affiliated organizations in Northern California, including Gilead. BayBio members are focused on research and product development and rely on access to public markets to fund their activities.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, counsel of record for all parties received timely notice of *amici*'s intention to file this brief. The parties have consented in writing to the filing of this brief.

BIOCOM is a trade association representing over 575 life sciences companies, service providers, and research institutions in Southern California.

Amici have a significant interest in the issue in this case. Publicly traded biotechnology companies, which are subject to close regulatory scrutiny by the Food and Drug Administration (FDA), experience high stock price volatility due to the nature of their research-driven industry. This combination of regulation and volatility makes every biotechnology company a target for private securities fraud lawsuits. The potential for harm is illustrated by the facts of this case, in which loss causation is alleged to depend on regulatory interactions between a biotechnology company and the FDA. The court of appeals' decision, which applied an overly lenient pleading standard to the allegations of loss causation, encourages strike suits against the biotechnology industry. *Amici*'s members should spend their resources expanding the boundaries of science, not defending baseless securities fraud lawsuits. *Amici* respectfully request that this Court grant the petition and clarify the pleading standard for loss causation in securities fraud cases.

STATEMENT

1. Respondents brought this suit against Petitioners in the United States District Court for the Northern District of California, alleging securities fraud in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 15 C.F.R. § 240.10b-5. Respondents sought in their Fourth Amended Complaint to attribute an October 2003 drop in Gilead's stock price to the disclosure, nearly three

months earlier, of an FDA Warning Letter to the company concerning its drug Viread, an antiretroviral agent used to treat HIV/AIDS. In prior complaints, Respondents unsuccessfully asserted that Petitioners fraudulently misrepresented the extent to which wholesalers had increased their inventories of Viread. *See* Pet. App. 77a–78a (rejecting these allegations). After additional setbacks in the district court, Respondents alleged in their Fourth Amended Complaint that Petitioners fraudulently failed to disclose the extent to which sales of Viread were the result of off-label marketing in violation of FDA regulations. *Id.* at 22a–27a.

Under the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, Respondents bore "the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages." 15 U.S.C. § 78u-4(b)(4). According to Respondents' current theory of loss causation, public disclosure of the FDA Warning Letter led to a decrease in demand for Viread among prescribing physicians, which led to a decrease in sales of the drug, which in turn led to a decrease in the price of Gilead's stock as investors reacted to this information. Pet. App. 34a, 38a n.12.

The district court rejected this theory and dismissed the Fourth Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Pet. App. 39a. Despite its view that the heightened pleading standard of Rule 9(b) did not apply to loss causation, Pet. App. 36a, the district court nevertheless held that Respondents had failed to plead this necessary

element. The district court identified two flaws under *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005). Respondents failed to allege that the market understood the FDA's objection to off-label marketing of Viread to have resulted in decreased demand for the drug. Pet. App. 34a–36a & n.9, 39a n.14; *see also* Pet. 20–24. Respondents also failed to show that they could isolate loss attributable to the alleged fraud from other causes of the drop in Gilead's stock price. Pet. App. 38a–39a; *see also* Pet. 24–27.

2. The United States Court of Appeals for the Ninth Circuit reversed. Pet. App. 20a. The court of appeals noted that *Dura* left open the question of the pleading standard for loss causation—specifically, of whether to apply Rule 8(a)(2) or Rule 9(b). Pet. App. 14a. While purporting to avoid resolving that question, the court of appeals went on to adopt a lenient standard for pleading loss causation in securities fraud cases. Borrowing language from this Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which construed Rule 8(a)(2), the court of appeals held that a complaint may not be dismissed for failing to allege loss causation "so long as the plaintiff alleges facts to support a theory that is not facially implausible." Pet. App. 17a. The court of appeals concluded that Respondents' loss causation allegations met that standard, *id.* at 20a, even though they were at odds with Respondents' prior theories of loss causation.

REASONS FOR GRANTING THE PETITION

I. The Biotechnology Industry Will Be Particularly Vulnerable To Baseless Lawsuits Under The Court Of Appeals' Inappropriately Lenient Pleading Standard For Loss Causation.

Owing to the nature of the industry in which they operate, publicly traded biotechnology companies are particularly susceptible to strike suits under the court of appeals' lenient pleading standard for loss causation. The court of appeals allowed this Section 10(b) action to proceed on the basis of a thin factual predicate. Respondents' allegation of loss causation comes down to two facts: an FDA Warning Letter and a drop in Gilead's stock price. Neither event is uncommon in the heavily regulated and highly volatile biotechnology industry. But under the court of appeals' pleading standard, a biotechnology company will be exposed to a private securities fraud lawsuit whenever a dip in stock price has been preceded by a regulatory notice during the previous quarter. By restoring a suitably rigorous pleading standard for loss causation, this Court can allow biotechnology companies to focus on innovation rather than litigation.

The importance of biotechnology to modern society is reflected in the regulatory scrutiny to which the industry is subject. Biotechnology innovations provide life-saving medical treatments and diagnostic procedures, disease- or herbicide-resistant crops, and a host of promising solutions for the world's environmental, medical, and agricultural

challenges, including the development of non-fossil, renewable sources of energy. From the food we eat to the human genome, the work of the biotechnology industry affects crucial areas of our shared experience. Federal agencies like the FDA therefore pay close attention to the field. As part of its regulatory program, the FDA will issue a Warning Letter if it finds that a regulatory violation has occurred. *See* 21 U.S.C. § 336 (authorizing "suitable written notice or warning" in response to "minor violations"). These Warning Letters are fairly common. *See* Peter Barton Hutt, *The State of Science at the Food and Drug Administration*, 60 ADMIN. L. REV. 431, 466 (2008) (noting that the FDA issued 2265 Warning Letters from 2004 to 2007). Indeed, the issuance of a Warning Letter to Gilead was so unremarkable that the market attributed no negative weight to the event when it was disclosed. *See* Pet. App. 35a.

Publicly traded biotechnology companies are also subject to high stock price volatility. Biotechnology innovations are the product of massive investments in research and development.[2] The time required to move a drug from clinical development

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[2] FED. TRADE COMM'N, TO PROMOTE INNOVATION ch. 3, at 16 (2003) ("R&D is particularly lengthy for biotechnology firms, because biotechnology innovation is more uncertain than innovation in other industries."); *Moving Research from the Bench to the Bedside: Hearing Before the Subcomm. on Health of the H. Comm. on Energy & Commerce*, 108th Cong. 47 (2003) (testimony of Phyllis Gardner, M.D., Senior Associate Dean, Stanford University) ("The biotechnology industry is the most research and development [intensive] industry in the world.").

through regulatory approval and into the market averages almost ninety-eight months. Joseph A. DiMasi & Henry G. Grabowski, *The Cost of Biopharmaceutical R&D: Is Biotech Different?*, 28 MANAGERIAL & DECISION ECON. 469, 473 (2007). The development and regulatory approval processes for biotechnology crops and other products are similarly extensive and fraught with risk. Moreover, the closely regulated nature of the biotechnology industry makes it especially sensitive to changes in government policy. Taken together, these factors create the potential for large swings in the price of a given biotechnology company's stock.

Respondents capitalized on the regulation and volatility inherent in the biotechnology industry. In connection with its marketing of Viread, Gilead received (and promptly disclosed) one of the many Warning Letters the FDA issues each year. Approximately three months later, Gilead's stock price dropped after the company filed a Form 10-Q showing that Viread revenue had declined, most likely as a result of wholesaler inventory adjustments (as analysts reported and Respondents originally alleged). These two events, which could have happened to any biotechnology company, prompted a private Section 10(b) action.

The loss causation requirement should have halted this opportunistic lawsuit at the pleading stage. Respondents failed to plead with particularity facts to support their theory that the Warning Letter depressed demand for Viread among prescribing physicians. Respondents also failed to plead with particularity facts to support the notion that the market was aware that Gilead's supposed off-label

promotion threatened Viread revenues. The court of appeals, however, allowed the suit to go forward on the ground that Respondents' loss causation theory is "not facially implausible," Pet. App. 17a, forcing Petitioners to defend this baseless Section 10(b) action at great cost to Gilead and its shareholders.

Gilead's experience is a harbinger of problems to come for the biotechnology industry. Other biotechnology companies will undoubtedly suffer an FDA Warning Letter followed by an unrelated drop in stock price several months later. Under the pleading standard for loss causation announced in this case, these companies will now suffer Section 10(b) lawsuits, too. In the Second, Fourth, Fifth, Seventh, and Eighth Circuits, investigation must precede litigation: securities fraud plaintiffs will be obliged to allege particularized facts that establish the connection between the regulatory action and the dip in stock price. *See* Pet. 17–19. But in the Ninth Circuit, the occurrence of two relatively common events—even if they are months apart—permits an immediate strike suit.

II. The Court of Appeals Adopted The Wrong Pleading Standard For Loss Causation.

This case presents a critically important question concerning pleading requirements under the PSLRA for private securities fraud actions. In *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), this Court declined the Solicitor General's invitation to address the pleading standard for loss causation in a Section 10(b) action. In the absence of direction from this Court, the lower courts have been confused and divided over the proper pleading standard for loss causation. While some courts have

correctly applied Rule 9(b), and others have applied a standard resembling Rule 9(b), *see* Pet. 17–19, the Ninth Circuit has adopted a watered-down standard that cannot be squared with Congress's intent in enacting the PSLRA, or with Rule 9(b)'s requirement that "the circumstances constituting fraud" must be pleaded "with particularity." This Court should grant review and clarify that Rule 9(b) applies to loss causation allegations under the PSLRA.

A. Enactment Of The PSLRA Created A Question Regarding The Relationship Between That Statute And Rule 9(b).

The federal courts have inferred from Section 10(b) and SEC Rule 10b-5 a private cause of action that Congress did not provide. *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971); *see Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975) (describing this "judicial oak which has grown from little more than a legislative acorn"). As this Court recently explained, the elements of this Section 10(b) action include:

> (1) *a material misrepresentation (or omission)*;
>
> (2) *scienter*, *i.e.*, a wrongful state of mind;
>
> (3) *a connection with the purchase or sale of a security*;
>
> (4) *reliance*, often referred to in cases involving public securities markets (fraud-on-the-market cases) as "transaction causation";
>
> (5) *economic loss*, 15 U. S. C. § 78u-4(b)(4); and
>
> (6) *"loss causation," i.e.*, a causal connection between the material misrepresentation and the loss, *ibid.*

Dura, 544 U.S. at 341–42 (citations omitted).[3]

Prior to 1995, the courts of appeals were unanimous in subjecting these Section 10(b) actions to the heightened pleading standard of Rule 9(b).[4] *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2507 (2007) ("Prior to the enactment of the PSLRA, the sufficiency of a complaint for

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[3] Although the *Dura* Court cited only the PSLRA in identifying the loss causation element, that element was originally a judicial creation. *See Bastian v. Petren Res. Corp.*, 892 F.2d 680, 683–86 (7th Cir. 1990) (Posner, J.); *Chem. Bank v. Arthur Andersen & Co.*, 726 F.2d 930, 943 n.23 (2d Cir. 1984) (Friendly, J.); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 549 (5th Cir. 1981), *rev'd on other grounds*, 459 U.S. 375 (1983); *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374, 380 (2d Cir. 1974).

[4] *E.g.*, *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1277–79 (D.C. Cir. 1994); *Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 878–80 (1st Cir. 1991); *Denny v. Barber*, 576 F.2d 465, 468–70 (2d Cir. 1978) (Friendly, J.); *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 373 n.17 (3d Cir. 1993) (Becker, J.); *Hillson Partners Ltd. P'ship v. Adage, Inc.*, 42 F.3d 204, 209 (4th Cir. 1994); *Shushany v. Allwaste, Inc.*, 992 F.2d 517, 520–21 (5th Cir. 1993); *Kellman v. ICS, Inc.*, 447 F.2d 1305, 1309 (6th Cir. 1971); *Schaefer v. First Nat'l Bank of Lincolnwood*, 509 F.2d 1287, 1297 (7th Cir. 1975); *Knox v. Lichtenstein*, 654 F.2d 19, 20, 22 (8th Cir. 1981); *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1545 & n.3 (9th Cir. 1994) (en banc); *Seattle-First Nat'l Bank v. Carlstedt*, 800 F.2d 1008, 1010 (10th Cir. 1986) (per curiam); *Friedlander v. Nims*, 755 F.2d 810, 812–14 (11th Cir. 1985). Several courts specifically applied Rule 9(b) to the judicially created loss causation element for Section 10(b) actions. *See, e.g.*, *Aquino v. Trupin*, 833 F. Supp. 336, 342 (S.D.N.Y. 1993); *In re Sahlen & Assocs., Inc. Sec. Litig.*, 773 F. Supp. 342, 351 (S.D. Fla. 1991); *Ames v. Uranus, Inc.*, No. 92-2170, 1993 WL 106896, at *6 (D. Kan. 1993).

securities fraud was governed not by Rule 8, but by the heightened pleading standard set forth in Rule 9(b)."). Rule 9(b) obliges a party to "state with particularity the circumstances constituting fraud," although scienter "may be alleged generally."

With the enactment of the PSLRA in 1995, Congress "imposed statutory requirements" on the judicially created Section 10(b) action. *Dura*, 544 U.S. at 341. These requirements were calculated "to deter or at least quickly dispose of those suits whose nuisance value outweighs their merits." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81–82 (2006); *see Tellabs, Inc.*, 127 S. Ct. at 2508 (The PSLRA was "[d]esigned to curb perceived abuses of the § 10(b) private action."). Among other things, Congress codified at 15 U.S.C. § 78u-4(b)(4) the loss causation requirement previously recognized by the courts. *See* JAMES D. COX ET AL., SECURITIES REGULATION: CASES AND MATERIALS 702 (5th ed. 2006).

As part of its effort to curb strike suits, Congress also altered the pleading standard for private securities fraud actions. *See* 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1301.1, at 298 (3d ed. 2004) ("Concerned that Federal Rule 9(b) was not being applied effectively by the federal courts to prevent [frivolous securities class action lawsuits], Congress amended the Securities Exchange Act of 1934 . . . to include unique pleading requirements for private actions alleging securities fraud."). This marked a departure from Congress's traditional silence on the subject of pleading standards under the Federal Rules of Civil Procedure. *See* 4 CHARLES

ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1001, at 7–10 (3d ed. 2002) (recounting limited congressional modifications to the Federal Rules of Civil Procedure).

The PSLRA imposed stringent new pleading requirements for two elements of the Section 10(b) action. First, it required that "the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1). Second, on the issue of scienter, which Rule 9(b) otherwise permits to be "alleged generally," the PSLRA required that "the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Id.* § 78u-4(b)(2).

These PSLRA pleading requirements, which only govern misrepresentation and scienter, do not cover every element of the Section 10(b) action. *See Dura*, 544 U.S. at 341–42 (listing six elements). Of particular importance in this case, the PSLRA does not specify a pleading standard for loss causation. *See* 15 U.S.C. § 78u-4(b)(4). The incomplete coverage of the PSLRA's pleading requirements raises the question of what standard governs the statutory element of loss causation where the statute is silent. As we explain below, the answer is clear that Rule 9(b) rather than Rule 8(a)(2) applies.

B. The PSLRA Does Not Displace The Rule 9(b) Pleading Standard For Loss Causation In Section 10(b) Actions.

Rule 9(b) and the PSLRA operate together to provide the pleading standard for securities fraud actions. Where the PSLRA specifies the pleading standard for a particular element of the Section 10(b) action, such as for scienter, the statute trumps the Rule. The other elements of the securities fraud action, including loss causation, should remain subject to Rule 9(b). As the Solicitor General argued in *Dura*:

> Because loss causation is an element of the plaintiff's affirmative case, a complaint must contain allegations that establish the element either directly or inferentially. And because loss causation is an element of a fraud cause of action, the allegations must be "stated with particularity," Fed. R. Civ. P. 9(b), and must satisfy the pleading requirements added to the 1934 Act by the PSLRA, see 15 U.S.C. 78u-4(b)(1) and (2).

Brief for the United States as Amicus Curiae Supporting Petitioners, *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005) (No. 03-932), 2004 WL 2069564, at *14–*15 (citation omitted). This Court declined the Solicitor General's invitation to address the issue in *Dura*, 544 U.S. at 346, but should now take this case to clarify that Rule 9(b) provides the pleading standard where the PSLRA is silent.

Rule 9(b), which the courts of appeals uniformly applied to Section 10(b) actions before the PSLRA, provides that a party alleging fraud "must

state with particularity the circumstances constituting fraud." The judicially created loss causation element of the Section 10(b) action, as codified in the PSLRA, is among the "circumstances" of the fraud that must be pleaded with particularity. *See Teachers' Ret. Sys. v. Hunter*, 477 F.3d 162, 186 (4th Cir. 2007) ("A strong case can be made that because loss causation is among the circumstances constituting fraud for which Rule 9(b) demands particularity, loss causation should be pleaded with particularity.") (internal quotation marks omitted); *In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 336 (S.D.N.Y. 2003) (holding that "Rule 9(b) governs the pleading of the remaining elements of the claims: loss causation, transaction causation, reliance and damages"). Were it otherwise, Rule 9(b) would list loss causation alongside scienter as an element that "may be alleged generally." *Cf. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius.*").

Nothing in the PSLRA suggests that Congress intended to alter Rule 9(b)'s pleading requirement for loss causation. The PSLRA did strengthen the pleading standard for the misrepresentation and scienter elements of the Section 10(b) action. *See* 15 U.S.C. § 78u-4(b)(1)–(2). As to these elements, courts have correctly accorded controlling effect to Congress's intent to modify the pleading standards. *See, e.g., In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 531 n.5 (3d Cir. 1999) ("Rule 9(b)'s provision allowing state of mind to be averred generally conflicts with the Reform Act's requirement that plaintiffs 'state with particularity facts giving rise to

a strong inference' of scienter. In that sense, we believe the Reform Act supersedes Rule 9(b) as it relates to Rule 10b-5 actions.") (citation omitted). But the PSLRA did not provide a pleading standard for loss causation, *see* 15 U.S.C. § 78u-4(b)(4), leaving nothing with which Rule 9(b) could conflict. *See In re Initial Pub. Offering*, 241 F. Supp. 2d at 335 ("Congress intended that the PSLRA supercede the Federal Rules only as to those elements which the PSLRA explicitly mentions (*i.e.*, scienter and material misstatements and omissions). In all other respects, the Rules govern these pleadings.").

Congress's silence on the subject of pleading loss causation does not suggest that the PSLRA was calculated to disturb the preexisting Rule 9(b) standard for securities fraud actions. In light of the PSLRA's purpose of preventing securities fraud strike suits, there is no reason to believe that Congress meant to relax the plaintiff's burden at the pleading stage.

The legislative history is informative. The Senate Committee Report discusses loss causation under the heading, "*A strong pleading requirement.*" S. REP. NO. 104-98, at 15 (1995) ("The Committee also requires the plaintiff to show that the misstatement or loss [sic] alleged in the complaint caused the loss incurred by the plaintiff."). One would not expect to see loss causation discussed as part of the PSLRA's "*strong pleading requirement*" if Congress had intended to weaken the pleading standard for loss causation by displacing Rule 9(b), presumably with the more lenient standard of Rule 8(a)(2). In the absence of congressional intent to displace it, Rule 9(b) should be held to provide the

pleading standard for Section 10(b) actions as to elements, like loss causation, on which the statute is silent.

C. The Court Of Appeals Erred By Adopting And Applying A Rule 8(a)(2) Standard To Loss Causation.

Rather than apply Rule 9(b)'s particularity requirement to the loss causation allegations in the Fourth Amended Complaint, the court of appeals applied the more lenient standard of Rule 8(a)(2), which was recently interpreted in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007). Notwithstanding its statement that "[w]e need not resolve this issue today," Pet. App. 14a, the court of appeals effectively held Rule 9(b) inapplicable to allegations of loss causation in a Section 10(b) action by adopting a Rule 8(a)(2) standard. The court of appeals erred in so holding.

In reviewing Respondents' allegations of loss causation, the court of appeals was guided by its permissive reading of *Twombly*. The court began by quoting *Twombly* for the proposition that "[t]he complaint is properly dismissed if it fails to 'plead "enough facts to state a claim to relief that is plausible on its face." ' " Pet. App. 12a (quoting *Weber v. Dep't of Veterans Affairs*, 521 F.3d 1061, 1065 (9th Cir. 2008) (quoting *Twombly*, 127 S. Ct. at 1974)). The court continued:

> But so long as the plaintiff alleges facts to support a [loss causation] theory that is not facially implausible, the court's skepticism is best reserved for later stages of the proceedings when the plaintiff's case can be

> rejected on evidentiary grounds. "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely."

Id. at 17a (quoting *Twombly*, 127 S. Ct. at 1965 (second brackets in court of appeals decision)). The court distilled from *Twombly* a lenient rule to govern loss causation: "So long as the complaint alleges facts that, if taken as true, plausibly establish loss causation, a Rule 12(b)(6) dismissal is inappropriate. This is not 'a probability requirement . . . it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of loss causation." *Id.* at 18a (quoting *Twombly*, 127 S. Ct. at 1965 (ellipses in court of appeals decision)). The court concluded that Respondents satisfied its *Twombly* rule for pleading loss causation. *Id.* at 20a (quoting *Twombly*, 127 S. Ct. at 1965).

The court of appeals did not faithfully apply Rule 8(a)(2) as construed in *Twombly*. Respondents' current theory of loss causation is not plausible in light of (1) the scant facts they have alleged to support it and (2) the existence of facts contradicting their theory. *See* Pet. App. 33a-39a & nn.9, 10, 12, 14 (finding allegations too speculative to satisfy Rule 8(a)(2) standard). Nonetheless, the court of appeals' heavy reliance on *Twombly* undermines its conclusion that Respondents could have satisfied Rule 9(b). *Twombly*, after all, was a Rule 8(a)(2) case. *See* 127 S. Ct. at 1964–69; *id.* at 1975–77 (Stevens, J., dissenting). Whether the Fourth Amended Complaint could withstand *Twombly*'s pleading standard does not answer whether it

satisfies the more stringent standard of Rule 9(b). *See id.* at 1973 n.14 (majority opinion) (distinguishing the heightened Rule 9(b) standard, which the Court did "not apply," from the applicable, less demanding standard of Rule 8(a)(2)).

In adopting a "not facially implausible theory" standard based on Rule 8(a)(2), the Ninth Circuit has created a split of authority with the Seventh and Fifth Circuits, which have correctly applied the Rule 9(b) standard to loss causation. *See Tricontinental Indus., Ltd. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824, 833, 843–44 (7th Cir. 2007); *Catogas v. Cyberonics, Inc.*, 292 Fed. App'x 311, 312 (5th Cir. 2008) (per curiam); *see also* JAMES D. COX ET AL., SECURITIES REGULATION: CASES AND MATERIALS 718 (5th ed. 2006) (attributing to the Second Circuit the view that "loss causation . . . must be pleaded with particularity under Rule 9(b)," citing *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161 (2d Cir. 2005)). This division of authority frustrates Congress's goal of bringing uniformity to securities fraud pleading standards by enacting the PSLRA. *See Tellabs, Inc.*, 127 S. Ct. at 2508 ("Setting a uniform pleading standard for § 10(b) actions was among Congress' objectives when it enacted the PSLRA."). This Court should take the opportunity to restore uniformity by clarifying that Rule 9(b) applies to allegations of loss causation in securities fraud cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TOM DILENGE
GENERAL COUNSEL
BIOTECHNOLOGY INDUSTRY ORGANIZATION
1201 Maryland Ave., SW
Suite 900
Washington, DC 20024
(202) 962-9200

JONATHAN L. MARCUS
Counsel of Record
JAMES P. SULLIVAN
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 662-6000

Counsel for Amici Curiae
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